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Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1829

GRIFFIN B. BELL, ET AL.,

Petitioners,

v.

LOUIS WOLFISH, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

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OTHER AUTHORITIES CITED

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American Correctional Association,
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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet.App.1a-37a) is reported at 573 F.2d 118. The opinions of the district court (Pet.App.74a-225a) are reported at 439 F.Supp. 114 and 428 F.Supp. 333.

JURISDICTION

The respondents adopt the jurisdictional statement contained in the brief of the government.

QUESTIONS PRESENTED

1. Whether the government may impose substantial restrictions and privations upon pretrial detainees, beyond those necessary for safe custody and jail security, without the justification of a compelling governmental necessity.

2. Whether the overcrowding by forced double occupancy of single-person cells at the Metropolitan Correctional Center is violative of the Due Process Clause.

3. Whether the government is sufficiently justified in (a) conducting humiliating visual anal and genital inspections of all detainees after supervised contact visits without regard to actual suspicion of contraband; (b) forbidding detainees to watch, from a reasonable distance, the government's frequent and random cell searches; and (c) prohibiting the receipt by detainees of all items of personal property from outside the institution.

4. Whether the significant post-judgment changes in the government's position concerning receipt of literature by inmates warrant dismissal of the writ of certiorari on this issue as improvidently granted; and if not, whether the government is sufficiently justified in prohibiting the receipt by detainees of all books, magazines, and other literature from any source other than the publisher.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

To those provisions contained in the brief for the government, respondents add the First Amendment to

the Constitution of the United States, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT

A. Introduction

The Metropolitan Correctional Center (MCC) was built primarily to house pretrial detainees. The institution also houses inmates waiting imposition of sentence or designation to another institution, and a group of sentenced inmates—numbering more than 100 at the inception of this litigation—designated to serve their sentences at the MCC for the purpose of working at the institution. Pet.App.19a, 74a-75a, 202a; S.A.27 para 6.[1]

The principal architectural feature of the institution, which opened in August, 1975, in downtown Manhattan, was the functional, or "modular," housing unit. Two of these mostly self-contained units made up a typical housing floor. Each unit had several clusters of cells.[2] The cells, which were designed to accommodate

[1] Numerical references preceded by "A" refer to the joint appendix in the Court. "Pet.App." references are to the appendix to the petition for writ of certiorari. "S.A." references are to the supplemental appendix of the parties in the Court. "Pet.Br." references are to the government's brief. "J.A." references are to the joint appendix in the Second Circuit. "Tr." references are to pages of the trial transcript.

[2] The second and third floors contain one unit per floor; one of the units on the eleventh floor contains six dormitory rooms.

one inmate, open to corridors which, in turn, lead to a multipurpose activity room. S.A., *passim*. Thus, when opened, the 12-story structure had no indoor gymnasium, ground-level recreation area, central chapel, auditorium, reading room or dining area. Inmates might not leave their housing unit to go to the general or law library or the commissary. Classrooms were in the unit. All activities and services for detained persons were provided, with few exceptions—such as sick call and a daily rooftop exercise hour when the weather permitted—directly in the housing unit, rather than in central facilities serving the entire institution. Pet.App. 77a-80a, 91a, 98a, 100a, 111a, 208a n.6.

The institution was designed to accommodate 449 inmates. Pet.App.115a. However, within three months of opening, population within the institution expanded. Plans were developed to accommodate what Warden Taylor described as an "expected increase" in population, to exceed 600 inmates. A.21, 23, 33. Individual cells were fitted to house two inmates by installation of bunk beds; single beds in the dormitory unit were also replaced by bunk beds, doubling the population of that unit; and beds were also placed on the balconies of the multipurpose rooms and in the corridors of the residential units. Pet.App.115a-129a, 203a.

Doubling the dormitory population produced conditions of "intolerable crowding, strain, and distortion of facilities . . . ." Pet.App.121a. Toilet facilities were rendered "grossly inadequate," as were equipment and facilities for eating, recreation, and reading. Pet.App. 122a-123a. To salvage some modicum of privacy, inmates who occupied the lower bunks hung bedding

from the upper bunks to fashion tentlike enclosures, J.A.458, or placed towels over their heads. J.A.1951. Muslim inmates said their daily prayers in the lavatories. J.A.694. Furniture was added to the dormitory rooms which, while still insufficient for the doubled population, left the rooms so crowded that there was "scarcely room to move about." Pet.App. 122a.

An average of 27 inmates each night slept in corridors and balconies; some inmates remained in these areas for longer than a week. Pet.App.20a.[3] Not only did these inmates lack any private space, they were forced to attempt to sleep under lights shining 24 hours a day. Pet.App.20a-21a.

Superimposed on this environment was a host of institutional restraints. There was virtually no classification of pretrial detainees, including those who were double-celled. Pet.App.92a-93a. The institution was built without provision for an attorney-client visiting room. Thus, visits with attorneys took place in the general visiting rooms, "entailing long delays" and "totally vitiating confidentiality." Pet.App.35a. There were also substantial delays in processing social visitors, and visits were terminated early because of overcrowding and noise. Pet.App.131a. After each visit, inmates were required to submit to a strip search, which included a visual inspection by guards of the inmates' anal and genital areas.

[3]Given these findings by the district court, affirmed on appeal and unchallenged by the government here, the government's assertion that this unconstitutional housing occurred for but brief periods and to only a small number of inmates (Pet.Br.7) is inexplicable.

Random and frequent cell searches were conducted outside the inmates' presence; any item found was subject to seizure at the whim of a correctional officer. There was no requirement that inmates be notified of which items were taken. Nor was there an opportunity to challenge the seizure. Some inmate property was destroyed or never returned. Pet.App.154a, 158a-159a. All packages from outside the institution were prohibited, except for one at Christmas. Pet.App.162a. Inmates were not permitted to receive books or other printed material from outside the institution except from a publisher. A.24. The law library—no more than a storeroom—lacked many essential titles, and inmates were not permitted to engage in research in the library. Pet.App.102a-103a. Confidential mail received from attorneys was opened and read on a regular basis by correctional officials outside the presence of the inmate-addressee, in violation of the institution's own regulations. Pet.App.144a.[4]

In these circumstances, on November 28, 1975, inmates of the MCC filed the instant suit *pro se*. On December 29, 1975, the court assigned counsel and ordered that the case proceed as a class action. An amended petition was thereafter filed.

On January 28, 1976, following the government's announcement that visiting hours were about to be

[4]The institution also regularly forbade inmates in administrative detention the opportunity for daily exercise, despite its claim to the contrary. Pet.App.176a. Guards of one sex would, without announcement, enter the cells or toilets of inmates of the opposite sex when the inmates were in varying stages of undress. Pet.App.184a-185a. Another regular practice of the institution was to lock women, all of whom were housed in cells without toilets, into their cells for substantial periods of time for disciplinary or other reasons. Pet.App.177a-178a.

reduced sharply, the district court preliminarily enjoined such reductions in order to maintain the status quo pending the outcome of the litigation. 406 F.Supp. 1243 (S.D.N.Y. 1976); Pet.App.129a-130a. On October 1, 1976, following a similar announcement by the institution concerning telephone service, and for the same reasons, the district court issued a preliminary injunction. Pet.App.140a-141a.

Prior to trial, the parties moved for partial summary judgment. On January 5, 1977, the district court ordered that the institution end double-celling of both pretrial and convicted inmates (see *infra* at 9ff.), and prohibited continued enforcement of the "publisher only" rule (see *infra* at 24ff.). The court also ordered that correctional officers give receipts for items taken from inmate cells and prohibited the reading of outgoing mail without cause. Pet.App.9a.[5] On September 15, 1977, after a full trial, the district court decided the outstanding claims. Afterward, the court required the MCC to end housing in the common areas and overcrowding in the dormitories; to begin classification of inmates who posed a serious threat of violence or escape; and to maintain improvements made in its attorney and social visiting system. Pet.App.93a-94a, 125a-126a, 129a, 133a, 137a.[6] The court, while per-

[5]The court dismissed respondents' request for an order requiring the practice of opening all incoming mail in the inmate's presence and deferred resolution of the other issues until trial. Pet.App.9a.

[6]During the course of the litigation, the institution "repeatedly found it suitable . . . to improve conditions of which [respondents] complained." Pet.App.133a. Among these changes announced by Warden Taylor in his testimony were increased visiting hours, improved visiting procedures, and construction of an attorney visiting area. The district court concluded that "[i]t is plain that most of these improvements have been spurred by the lawsuit and would not have happened otherwise." Pet.App.133a.

mitting strip searches, prohibited the anal and genital visual inspections by correctional officers except on probable cause (see *infra* at 15ff.). The court directed that pretrial detainees be allowed to observe, from a reasonable distance, searches of their cells, and ordered that the total prohibition on inmates' receipt of packages from outside the institution be ended. Relief was ordered on a number of other issues.[7] In addition to granting relief for conditions violating the constitutional rights of detainees, the district court found a right to relief from arbitrary administrative action under the Administrative Procedure Act. Pet.App. 84a.

The court of appeals rejected the district court's determination on the applicability of the Administrative Procedure Act. Pet.App.14a-15a. However, the court determined that, in most instances, the district court's order "cured serious constitutional deficiencies in the operation of the MCC." Pet.App.2a.

Thus, the court affirmed the district court's decree enjoining the overcrowding caused by double-celling detainees,[8] by doubling the dormitory population, and

[7]The institution was directed, *inter alia*, to devise a system by which inmates could contest the seizure of property; to adhere to its own policy of opening legal mail only in the presence of the inmate-addressee; and to upgrade the law library. The court also denied relief on a number of respondents' claims. See, *e.g.*, Pet.App.186a-188a (admissions and transfers); 191a-195a (grievance procedures); 196a (ventilation and temperature). Decision on the issue of medical care was deferred pending a hearing before a magistrate. Pet.App.198a.

[8]The court of appeals vacated and remanded the question of whether double-celling for convicted inmates at the MCC constituted a violation of the Eighth Amendment. The court of appeals held that the district court had applied an incorrect legal standard to judge the conditions of confinement of double-celled convicts, but observed that, on remand,

(continued)

by housing inmates in the balconies and corridors of the institution. The court also upheld the district court's prohibition of routine anal and genital inspections, and its orders invalidating the publisher-only rule and the prohibition on receipt of packages. The court further affirmed the district court's order with respect to observation of cell searches. Pet.App.26a, 29a-33a.[9]

In the course of its opinion, the court of appeals contrasted the noble intentions of the designers of the MCC with the actual conditions within the institution, and called to mind the well-known statement of Samuel Johnson that "Hell is paved with good intentions." Pet.App.5a. We turn now to a detailed description of the factual record underlying the decisions of the court of appeals which the government now challenges.

B. Overcrowding by Double-Celling

The cells in the MCC which housed pretrial detainees ranged from 75.9 to 77.66 square feet in size.

(footnote continued from preceding page)

"the trial court may well find that double-celling in a 75-square foot room violates the Eighth Amendment." The court noted, however, that some of the rooms housing convicted inmates at the MCC measured up to 150 square feet, double the size of the rooms used for detainees. Pet.App.19a-20a.

[9]The court sustained the district court's conclusions, not challenged here, that the attorney visiting and law library regulations previously enforced violated the inmates' right of access to the courts, that the mail regulations at the MCC violated the inmates' First Amendment rights to receive and send mail, and that classification be instituted to permit additional movement within the institution. Pet.App.23a, 27a, 35a. The court reversed the district court's order, *inter alia*, striking down the institution's rule requiring inmates to wear jumpsuits, and vacated the order on social visiting and telephones.

Built into each was an uncovered toilet and sink, a towel rack, a 2′ x 4″ shelf, a mirror and light fixture, and a bookshelf. Furnishings consisted of a bed with two drawers, a desk, a chair, a lamp, and a wall bracket. Pet.App.203a; S.A.9, 12, 15, 17-18, 20.

The toilet is placed diagonally into the cell, and juts some two feet into the center of the cell beyond the door when it is closed. Each cell contains a window and an air vent. The placement of furniture leaves the inmate with a narrow aisle of some 30 square feet in which to move about. Pet.App.203a.[10]

Inmates are locked into their cells from 11:00 p.m. to 6:30 a.m.; at 4:00 p.m. until the afternoon count is completed; at 7:30 p.m. until the evening count is completed; and for disciplinary reasons. S.A.27.[11]

The cells open to corridors which, in turn, lead to the multipurpose room where the inmates may spend time when they are not locked into their cells. The institution contains no central facilities, and inmates eat, visit, and have indoor recreation, exercise,[12] and educational programs in the multipurpose rooms. Pet.App. 5a, 23a. The multipurpose rooms contain pantries

[10]See architectural plans attached as Exhibit 1 to the government's statement pursuant to Rule 9(g), Local Rules, United States District Court, Southern District of New York, which statement is the Supplemental Appendix to the Court.

[11]Later in the proceedings, it was learned that during the midnight to 8:00 a.m. shift, only one correctional officer patrolled the two largely independent and separate modular units on each floor. J.A.2561. To attract a guard's attention, an inmate had to pound on a locked cell door until the guard responded. Tr.1033-1034, 1154-1155; see J.A.621; Pet.App.179a.

[12]An inmate is allowed seven hours each week for exercise on the MCC's roof when weather permits.

furnished with one microwave oven. Tables for eating range in number from 3 to 14; and chairs vary in number—23, 30, 32, 43, and 57[13]—in addition to two or three lounge chairs and four or five couches. Also provided are one jogging machine, one medicine ball, and one exercycle. S.A.5, 10, 13, 14, 18, 21, 24.

The cells at the MCC were planned, designed, and constructed by the government to house only one person per room. The uncontradicted sworn statement of Paul Silver, the MCC architect, was that "the rule that we began with was that for every room we would only provide one—to put one man in a room." Silver believed that this "basic planning principle" had established a "population capacity" for the cells, that it would be a "very clear and apparent violation of capacity when you try to put two people in a room," and that conversion to double-bunking would be a "clear violation of the capability of that space." The architect concluded: "There is more than enough, you know, objections to double-celling." A.9.

Nevertheless, when, within four months of the opening of the MCC, its population began rising from its rated capacity of 449, and when it was predicted that the population would increase still further, the government turned immediately to the solution of housing two detainees in each cell. A.21, 33. Approximately one-third of the cells in the institution—120 of them—were altered for double occupancy. Affidavit of Warden Taylor dated December 10, 1975, referred to at A.21, 23. By late December 1976, as many as 73 cells

[13]S.A.5, 10, 13, 14, 18, 21, 24. The women's unit, which was never double-celled, is not included in this count.

were already housing two inmates. A.34. Of that number, 35 cells in two of the units were being used to house pretrial detainees. A.33.[14] There was no effort to classify the detainees who were double-celled to eliminate, for example, inmates with a history of violent behavior. See A.34-35.

During this same period a group of 103 convicted and sentenced inmates, known as "the cadre," were housed at the MCC as part of the institution's work force. S.A.27; Pet.App.19a. Prior to the district court's order prohibiting double-celling, none of these sentenced prisoners was transferred out of the MCC to alleviate the overcrowded conditions. Tr.1887-1888; Pet.App.19a; see also A.22-24. Rather, cells for detainees as well as sentenced inmates were altered by replacing the single beds with bunk beds and, in some cases, adding a second chair. A.21; S.A.12 n.; 17 n. The bunk beds were placed against the wall so that cold air from the air vent blew one foot above body level on the upper bunk. Pet.App.206a. The placement of the bunk beds necessitated the dismantling, and often the removal, of the drawers used by inmates to store their few possessions. Pet.App.207a.

On December 22, 1976, at the government's own suggestion, the district judge visited the institution to observe the "physical facts of double celling." Pet.App. 203a. During his visit, the district judge observed that the double bunks were placed so that the air vent blew

[14]These two units were 7-N and 9-N. S.A.26. All 24 cells in Unit 3, the unit housing government witnesses in protective custody, S.A.26, were designated for double-celling, and up to 41 people had been housed in the unit. A.33-34. In Unit 2, the honor unit housing convicted people and the "cadre," S.A.26, 14 cells were double-occupied. S.A.2; A.33.

cold air on the upper bunk a foot or so above body level; that, to cope with this "architecturally unintended unpleasantness," inmates had blocked the air vents; and that, as a result, the cells were rendered musty and unpleasant smelling. He also saw that shelf space, adequate for one inmate, was not adequate for two, and that the removal of all the storage drawers from many of the cells left no place for inmates to store personal items. And he noted that the placement of furniture in the room left only a narrow aisle for walking. Pet.App.203a, 206a-207a.[15]

Finding the open toilet a "stark centerpiece," Pet.App.211a, the court observed that there was no place for each of two people to "walk or eat or write a letter or be quiet or be outside another's toilet." Pet.App.206a. The court concluded that, under these circumstances, forcing an inmate to live with an "unselected companion" not only constituted a denial of decency and privacy, but of "personal security" as well. Pet.App.207a, 211a.[16]

The court further found that double-celling not only denigrated an inmate's dignity, security, and privacy in the cell, it affected the operation of the unit's multi-

[15]See also the architectural plans, attached as Exhibit 1 to the government's statement pursuant to Rule 9(g), Local Rules, United States District Court, Southern District of New York, which statement is the supplemental appendix to the Court.

[16]The problems and conflicts arising from these overcrowded conditions were confirmed by testimony at the later trial that among the worst features of dormitory overcrowding were the conflicts which resulted when people of differing habits were thrown together in the small space and the denial of privacy resulting from the use of lights by one person when another wanted to sleep, or the playing of radios at a loud volume. J.A.448, 815, 820-821. These findings were not appealed.

purpose room as well—the overcrowding taxed available facilities beyond their capacity and rendered them congested and noisy. Pet.App.207a.[17] The result, the court concluded, was that "[t]here is more pressure to eat in the cell, with its single chair, open toilet, and unselected companion." Pet.App.207a.

Having observed firsthand the conditions resulting from double-celling, the court found them "fundamental denials of decency, privacy, personal security, and, simply, civilized humanity. . . ." Finding the qualities of "threat, nausea, and degradation . . . visible and palpable for any observer," the court concluded (Pet.App.211a-212a):

> So, here, he who walks slowly and observes can read the uncontradicted evidence of circumstances that the law has now come to denounce as less than the constitutional minimum for the confinement of fellow human beings.

Based upon his personal observations, and after reviewing the extensive papers and exhibits, most of which were filed by the government, the court concluded that there "appear to be no genuine issues as to facts fairly to be deemed material," Pet.App.203a, and ordered relief on a motion for summary judgment.[18]

[17]The size and layout of the multipurpose rooms establish that they were planned and constructed for the "allotted number of single room occupants," and that they were not adequate for more than 48 inmates. Indeed, the district judge observed the obvious: that three pieces of exercise equipment, chairs which may number fewer than 10, and tables for eating usually numbering 7 or 10, were not adequate to meet the needs of a double-celled population. Pet.App.207a.

[18]The court considered the supporting affidavit filed on behalf of the government by William Menninger. While not disputing the factual observations made by Dr. Menninger, the court found that his opinions drawn from these facts failed to raise a triable issue. Pet.App.211a.

To comply with the district court order ending double celling, the institution reduced the number of sentenced "cadre" inmates from 103 to 21. Pet.App. 19a. "Cadre" jobs were then filled by pretrial detainees and sentenced prisoners present at the MCC on writs of habeas corpus. J.A.1229-1230. Reduction of the sentenced "cadre" occurred within 60 days, and no further stay of the double-celling order was sought. J.A. 3043.[19]

The court of appeals affirmed the findings of the district court that the condition of double-celling at the MCC resulted in "infringements on privacy and personal dignity," Pet.App.17a-18a, noting both the adverse effect on the detainee in his cell and the impact of overcrowding on the multipurpose common areas. The court also observed that the elimination of double-celling had been accomplished "merely by reducing [the institution's] permanent work 'cadre' of convicted inmates designated to serve their sentences at MCC . . . ." Pet.App.19a.

C. Anal and Genital Inspections

After each contact visit with a family member or friend, an inmate was taken to a small room near the visiting area where he or she was stripped and subjected to a visual examination of his or her anal and genital

[19]The institution has not double-celled inmates since March 1977—almost two years ago. Further, since August 28, 1978, when the order limiting the institution's total population to its functional capacity of 449 became effective, no emergency which, under the court's order, would permit double-celling for up to 10 days, Pet.App.51a, has been certified.

areas. Under a guard's supervision, inmates stripped naked, displayed their armpits, lifted their feet, and opened their mouths. Men lifted their genitals, and women assumed a position to facilitate a vaginal perusal. All inmates were required to bend over and spread their buttocks to allow a visual inspection of the anus. A.36; Pet.App.149a.

Dr. Frank L. Rundle, former chief psychiatrist for the New York City prison system, said that the strip search procedures required the inmates to assume a posture as humiliating as is possible in our culture. A.48-49.[20] Another expert, William Nagel, testified that requiring an inmate to expose his anus was an indignity "reducing a human being to a less than human quality." A.45.[21]

[20]At the time of the litigation, Dr. Rundle was supervising psychiatrist for the Lower East Side Service Center in New York City. As chief psychiatrist for the New York City detention facilities, Dr. Rundle had previously administered a staff of 300 and had supervised a budget in excess of $4,000,000. In addition to his position as chief psychiatrist for all New York City jails, Dr. Rundle had previously served as chief psychiatrist for the New York City Detention Facility at Rikers Island as well as for the California Training Facility at Soledad. Dr. Rundle had also served as an adviser to a federal judge of the Southern District of New York in a prison conditions case. J.A.736-738.

[21]William G. Nagel was Executive Vice-President of the American Foundation, Inc., and Director of the Institute of Corrections of the American Foundation. He had previously served as assistant superintendent and deputy warden of the New Jersey Correctional Institute at Bordentown; as Executive Secretary for Human Services in the Office of the Governor of Pennsylvania; as a consultant to the National Council on Crime and Delinquency and the President's Commission on Law Enforcement; and as a member of the National Advisory Commission on Criminal Justice Standards and Goals. Mr. Nagel had been a witness in previous cases for the Civil Rights Division of the United States Department of Justice. J.A.681-686.

Dr. Rundle, who has witnessed many such searches, maintained that, "almost without exception," they engendered "psychological sadism" among the guards and caused a correlative fear among inmates of sexual assault. A.49. This general assessment was given concrete expression by the testimony of an MCC guard who, when asked, was unable to deny that he might have told an inmate, in the course of a strip search, that he was going to "kick his ass," as well as by an inmate who testified that, during a strip search, an officer had threatened to "put his foot up" the inmate's "ass." Indeed, the psychological toll of the strip search procedure was such that inmates chose to forego visits rather than subject themselves to it. A.36-37, 57, 77.

The proffered justification for the anal and genital inspection was to prevent smuggling of small weapons and contraband into the prison. A.83-84; J.A.1225. However, the uncontradicted testimony of medical experts established that the anal inspection procedure was virtually useless, since contraband could be concealed in this area only if it was held between the buttocks or inserted into the rectum. If the item was held only between the buttocks, it would require that the inmate walk in an unnatural gait which would easily be detected without a cavity inspection. Both Dr. Rundle and the government's expert, Dr. Menninger, agreed that any contraband inserted into the rectum, beyond the anal sphincter muscle, would not be observed in a visual inspection. A.49-50, 82-83. Further, concealment would not only be a difficult and painful procedure, it would require time and opportunity not available in the visiting area. A.49-50. A correctional expert for respondents testified that he

was unable to recall a single instance, in his experience, of contraband being smuggled into an institution in an inmate's rectum. A.45.[22] No evidence was introduced by any of the witnesses for the government of a single item of contraband having been smuggled into the MCC in this way.[23]

The utility of these procedures was also offset by precautions taken with respect to visitors to the institution. As they entered the main lobby, visitors passed through a magnetometer and were examined with a metal detection device; some visitors were patted down. A.93; J.A.600, 601-602, 1077. The uncontradicted expert testimony was that, with these metal detection devices, no realistic possibility existed that weapons could be smuggled into the institution. A.45. Further, a fluoroscope was available for use, and brief cases and all packages, including women's purses, were opened and searched by hand. A.93; J.A.601, 1077. All materials or packages which the examining officer considered improper were taken from the visitor and retained on the first floor of the institution. J.A.142, 1077-1078, 1080. No food was permitted in the visiting rooms. J.A.142, 144, 838.

[22]The government, Pet.Br.72, n.54, refers to its expert's partial answer to the question of whether an inmate "could feasibly or with any frequency secrete contraband in the recum [*sic*] or something like that." The complete answer was "Absolutely. I know of cases where it has happened. It does not stop, your Honor, and would not stop somebody swallowing something, whether it passed in a balloon and swallowed something in a balloon and then passing it later, when they get back in the unit." A.71.

[23]In only one instance was something found in an inmate's vagina. A.74. Other instances of discovering smuggled contraband were unrelated to the use of body cavities.

Before entering the visiting room, the inmate was also searched, A.57-58; see also J.A.144 para. 2F (Exhibit C to Warden Taylor's affidavit of January 19, 1976); and the glass-enclosed visiting room was under the constant observation of a correctional officer. J.A.144, 1208-1209. The officer was also empowered to control the number of people in the visiting room at any time. J.A.1209.

All visiting room lavatories were locked, detainees were not permitted to use them, and visitors who wished to do so had to request the key. Pet.App.12a n.10; A.93; J.A.143. At the time of trial, a window was also installed in each lavatory door to permit the visiting room officer to keep under observation the lavatory interior. J.A.1210. Detainees were attired in brightly colored, long-sleeved, one-piece jumpsuits. J.A.528; see J.A.760. Removal of the jumpsuit, at least from the torso, would be required in order to insert anything into the rectum or the vagina. See J.A.925; A.45. Finally, the government's own witnesses testified that urine tests now administered at the MCC would deter the use of drugs, and therefore the importation of narcotics into the institution. A.85.

The district court found the strip search procedure to be "unpleasant, embarrassing, and humiliating," and that requiring an inmate to lift his genitals and spread his buttocks gave rise to a feeling of "deep degradation." Pet.App.149a. The court specifically credited the testimony that MCC guards made physical threats and that the search procedure was so intimidating to inmates as to deter visiting. *Id.* The court noted that the dearth of contraband discovered by anal inspections was no surprise, since an item actually inserted beyond

the anal sphincter muscle would be undetectable by visual inspection. Pet.App.150a. Concluding that the use of metal detectors would deter the introduction of metal objects and that the strip search would do the same for other items, the court found the government's security interests to be amply satisfied by a strip search without the anal and genital inspection. Pet.App.151a-153a.[24]

The court of appeals affirmed, stating that "the gross violation of personal privacy" inflicted by the anal and genital inspection was not outweighed by an "interest in maintaining a practice of so little actual utility." On these facts, it found the cavity inspection "to shock one's conscience." Pet.App.30a.

D. Cell Searches Conducted in the Detainee's Absence

MCC inmates were subjected to unannounced, random, and frequent cell searches by correctional officers. These searches were of two types: formal unit shakedowns and informal searches of a single cell. During formal searches, a group of cells was cordoned off, cleared of inmates, and each cell was searched thoroughly by a "unit" of correctional officers. Inmates were prohibited from observing them. During informal, single cell searches, the inmate, at the discretion of the officer, could be permitted to observe, but such permission was rare. A.39, 54, 62; J.A.584, 1240, 1241; Pet.App.154a.

[24]The opportunity to conduct cavity inspections is nonetheless still available on the finding by a correctional officer that there is probable cause to conduct such a search. Pet.App.153a.

Although the correctional officers were instructed to leave the searched cells in proper order, A.66, this directive was frequently violated. Guards often left inmates' personal belongings "in disarray," with, as a correctional officer himself testified, "personal property and bedding scattered over the room." Pet.App. 154a; A.62. Not only did inmates find their cells disturbed, but frequently personal items were missing. A.42, 43, 55. The respondents' correctional experts[25] emphasized that permitting the inmate to view searches of his cell would reduce the probability of improper behavior on the part of a correctional officer and that unobserved searches are a source of tension and hostility among inmates. A.46-47, 63-64.

The government's defenses of the regulation were that if a detainee were permitted to observe, he would distract the officers, move contraband, or perhaps become argumentative. A.66. But these claims did not comport with the government's own experience when officers permitted inmates to observe searches, during which there were no reported instances of interference or disturbance, or with the view of one of its experts, who thought inmates should be allowed to watch unless there was some real reason to believe they would be explosive. A.72-73.

The district court credited respondents' evidence that guards frequently left inmates' possessions in disarray after searches and that the search procedure was a source of tension and hostility which would be

[25]Among these experts was David Fogel, former Commissioner of Corrections for the State of Minnesota, who received his doctorate in criminology from the University of California at Berkeley and was a worker with juveniles in detention facilities in Marin County, California. Tr.1647-1648.

ameliorated by giving inmates the opportunity to observe cell searches. Pet.App.154a-155a. The court also found that movement of contraband could easily be prevented by officers on the scene and that the fear of threats or arguments could be remedied simply by removing an argumentative inmate. On this record, the court found that the government's security concerns were not sufficient to justify its prohibition on observation of a cell search by a well-behaved detainee from a reasonable distance. Pet.App.155a-156a.

The court of appeals affirmed, for the reasons stated by the district court.

E. Prohibition on Receipt of all Personal Property

The inmates of the MCC were not permitted to bring or receive packages, including food or personal effects, from outside the institution, except for a single food package at Christmas. A.25, 95. Detainees were permitted to possess no property other than that furnished by the institution, purchased at the MCC commissary, or purchased through "approved" channels. A.94.

While the MCC does maintain a commissary, inmates were not allowed to visit it. They could, once a week, request items by completing an order form. A.28, 96. Detainees could spend $15 per week, or up to $50 monthly, on available commissary items. A.95; J.A. 525.[26] Those who could afford to might obtain from the commissary cigarettes and tobacco, snack food, coffee, cosmetic items, radios and batteries, watches, and sweatsuits. A.28-29.

[26]There were frequent shortages in items listed on the order forms. J.A.935; Tr.612-613.

The evidence at trial demonstrated that the few items of property an inmate may possess while incarcerated are of the greatest importance to him and that the total restriction on the receipt of packages was a serious deprivation. A.73, 60, 47. Indeed, in the district court, the government conceded that its restrictions on receipt of packages constituted a punitive device for convicted inmates. Pet.App.165a-166a.

The MCC's restrictions on packages were far more severe than those imposed at some institutions, including maximum security institutions for convicted persons. For example, New York State permits its prisoners to receive a monthly package of food in addition to clothing and magazines. A.55; Pet.App. 163a.

In the district court, the government suggested several grounds for its regulations. Thus, the warden asserted that the blanket prohibition upon receipt of packages was necessary to narrow the gap between the "haves" and the "have nots" and to prevent problems of gambling, purchase of favors, and strong-arming. A.67-68, 85. It was also asserted that receipt of packages would cause sanitation and storage problems, and that the rules were required to prevent introduction of contraband. A.67, 80, 85.

The district court found these concerns belied "by experience or by [the government's] own self-contradictions." Pet.App.162a. The assertion that the limited introduction of packages would create problems of strong-arming was inconsistent with the government's sale to inmates through the commissary of "items of substantial cost—*e.g.*, $18 sneakers and $27 radios." The asserted storage problem caused by packages was

inconsistent with the institution's purveying of food from the commissary. The claim that a total ban on packages was necessary to avoid problems of smuggling was belied both by the existence of less restrictive regulations at maximum security institutions and the lack of any explanation as to why protective measures familiar in those institutions and at the MCC could not be used. Pet.App.163a-165a.

The court of appeals affirmed, pointing out that the court order did no more than require the institution to devise reasonable regulations, preserving the institution's right to regulate the dollar value of goods and the number of packages received in the institution. Pet.App.33a.

F. The "Publisher Only" Rule

The government enforced a rule at the MCC which prohibited an inmate from receiving from anyone but the publisher or a book club hard or soft cover books, magazines, newspapers,[27] or other printed material. The government asserted that security considerations justified this "publisher only" rule. A.24 para 10. However, it failed to offer evidence of difficulties with the admission of reading matter at other institutions where the "publisher only" rule has been eliminated; nor did it explain why regulations more narrowly tailored would not suffice.

Finding that the publisher only rule implicated rights protected by the First Amendment, and, with respect to indigents, under the Fifth Amendment, the court

[27]Newspapers were available at the MCC only by purchase from a prison vendor. S.A.29 para. 19. However, there were too few copies to meet the inmate demand. A.54.

concluded that the generalized security claim postured by the government did not outweigh the "high constitutional interests here at stake." Pet.App.215a.[28] However, the order did not disturb the institution's right to search those books allowed into the institution. Pet.App.72a.

The court of appeals agreed with the district court that "[t]he 'publisher only' rule severely and impermissibly restricts the reading material available to inmates." Pet.App.26a. The court further noted that many books desired by inmates were not available, either in the library or from the publisher, and stated that it "is inconceivable that the first amendment rights of an incarcerated individual do not extend beyond a few, selected titles." Pet.App.26a-27a.

In its brief to the Court, the government has advised that, following the decisions of the courts below—indeed, five days before the certiorari petition was filed—the Bureau of Prisons regulation was modified to permit books from bookstores, and that it is now "in the process" of modifying the rule to permit receipt of paperback books and magazines from any source. Pet.Br.66 n.49, 69 n.51. The government now asks the Court to review only that portion of the district court order requiring the institution to permit receipt of **hardbound books. Pet.Br.69. However, at no time has** the government moved in the district court for a modification of that court's order.

[28]In so holding, the court rejected the government's position that existence of a prison library obviated the need for relief. Pet.App.216a. As the court was aware, the general library at the MCC is not accessible to detainees; inmates must submit a written request for a book, and then must wait to receive it. S.A.28 para. 13.

SUMMARY OF ARGUMENT

It is fundamental to the Anglo-American tradition of criminal justice that an individual accused of crime is presumed innocent until proven guilty and may not be punished unless first convicted of a crime. Accused persons who are detained, in lieu of bail or other conditions of pretrial release, for the purpose of assuring their presence at trial, do not, by the fact of their confinement, become proper subjects for punishment.

This principle has unfortunately not been reflected in the practice of pretrial detention in this country. Detainees have been subjected to conditions of confinement much harsher and more restrictive than necessary to accomplish the purpose of assuring their presence at trial and the safe maintenance of the jail. Since the abandonment of the "hands off" doctrine, the federal courts, in considering the conditions of pretrial confinement, have articulated the principle that restrictions on the rights of pretrial detainees must be no greater than necessary to accomplish the purpose of ensuring the detainees' appearance at trial and the collateral purpose of safe maintenance of the jail. Restrictions not necessary for these purposes are inconsistent with the fundamental right not to be punished without a criminal conviction, and therefore must be justified as necessary to some other compelling interest of government. Any restriction on a substantial right not sustainable at this level of justification is an aggravation of the already severe deprivations of liberty inherent in incarceration and renders that restriction punitive in law.

The overcrowding of the Metropolitan Correctional Center by forced double occupancy of single-person cells, enjoined by the courts below, is justified by the government solely on grounds of economy and administrative convenience. However, these factors by themselves are not sufficient to justify serious restrictions on constitutional rights. The record shows that this double-celling was in direct contravention of the intent, design, and construction of the MCC, each of whose cells was purposefully built for the confinement of a single individual. The consequences of double-celling included overcrowding which led to a severe denial of privacy, dignity, and personal security when the occupants were in the cell. Moreover, this additional population in excess of the single-cell capacity of the housing units overburdened the common facilities planned and constructed for each unit, with oppressive consequences for the quality of life of the occupants, rendering unworkable the institution's "modular confinement" system, which was based on the premise that all inmate services and activities should be provided in the housing unit. The cumulative effect of this overcrowding and its consequences was a denial of the presumptively innocent detainees' fundamental right to privacy as well as their fundamental right not to be subjected to punishment in the absence of a criminal conviction. On this record, then, the government's failure to justify its overcrowding of the jail on any ground other than economy and convenience renders the double-celling of detainees punitive in effect.

Moreover, the argument of cost and inconvenience of housing detainees consistent with the government's

own plans for the MCC fails even on its own terms, since the government has been in compliance with the lower courts' rulings on double-celling since their effective date in March 1977 and has never made any showing that court schedules have been disrupted, that new facilities have been required, or that any other major expense or disruption has resulted from the prohibition on double-celling. Thus, even if the Court were to accept the government's position that only the "enhanced scrutiny" test articulated in *Moore v. City of East Cleveland,* 431 U.S. 494 (1977), need be met, the insubstantiality of the cost and convenience argument, as well as the absence of any other justification, falls far short of that standard as well as the more frequently used "compelling interest" standard.

The four other practices before the Court—routine and baseless anal and genital cavity inspections after all visits, the exclusion of detainees from observation of searches of their cells, the total prohibition on receipt of property from outside the institution, and the "publisher only" rule—are each defended on claimed grounds of institutional security. The government asserts, based on the Court's decision in *Jones v. North Carolina Prisoners' Labor Union, Inc.,* 433 U.S. 119 (1977), that the courts below should have granted to the opinions of jail administrators a degree of deference so extreme as to amount to a resurrection of the discredited "hands off" doctrine. However, *Jones* is inapposite to this case, both because the present respondents are pretrial detainees entitled to protections not available to convicted persons, and because the extreme danger of concerted activity by prisoners—the basis of the Court's concern in *Jones*—is not

implicated by any of the challenged rulings of the court below. Further, the courts below gave due deference to the opinions of the jail's administrators except where substantial evidence showed that extreme privations constituted an exaggerated response to claimed prison interests.

The body cavity inspections enjoined below were the most extreme feature of a strip search procedure which was left otherwise undisturbed by the lower courts. After every contact visit, each inmate was forced to disrobe completely in the presence of a guard and, often, other inmates. In addition to inspection of clothing and the requirement that the inmate lift his feet, extend his arms, and open his mouth, inmates of both sexes were compelled to display their anal and genital areas for inspection, a process which was found by the courts below to engender great fear and anxiety in inmates by its very nature and to have been accompanied at times by actual threats of physical abuse by guards. In the absence of cause to believe that a detainee is actually concealing contraband, the courts below concluded that this "gross violation of personal privacy," Pet.App.30a, could not be justified under the Fourth Amendment, even in the context of a jail. This conclusion was based not only on the degrading and intrusive nature of the search, but also on its lack of utility as demonstrated by the record. Given the close surveillance of the visiting arrangements at MCC and the lack of opportunity for prisoners to obtain and conceal contraband, as well as the other rigorous security procedures employed by the institution and unaffected by the orders below, the government's claim of a substantial security interest in this further drastic imposition cannot be credited.

The courts below also enjoined as unreasonable the practice of excluding detainees from observing the random and frequent searches of their cells—searches which involved thorough inspections not only of the room and its fixtures, but also of all personal items and papers of the inmates. During these searches, inmates' belongings were often treated with disrespect and their rooms left in disarray, and as a result of these abuses and the inmates' inability to be present at the searches, inmates feared that personal items would be taken. The district court held that permitting inmates to observe these searches would both allay the inmates' fear and deter the guards from exceeding authorized limits of the search process. The courts further found that the security interests asserted by the government could be adequately served by an order requiring only that the inmate be permitted to watch the search from a reasonable distance and permitting disruptive inmates to be removed from the area entirely.

The total prohibition on receipt of property from outside the institution was justified by the government in terms of security, but the argument ultimately amounted to an unwillingness to take the time to search incoming packages. No reason was offered why limited types and quantities of personal items, subjected to a thorough search, could not be admitted. This sweeping prohibition on the basic right to use and enjoy property was found by the courts below to exceed the government's legitimate interests. Nevertheless, no specific items were required to be admitted; the courts below required merely that the government re-examine its policy and promulgate reasonable regulations, suggesting only that "we are sure that it will not impose draconian limitations." Pet.App.33a.

Finally, the government has advised the Court that its "publisher only" rule is being substantially modified to permit inmates to receive soft-covered books and magazines from any source. It has accordingly informed the Court that only issues relating to hard-cover books remain for decision. The courts below have never been advised of these proposals, and thus have never had an opportunity to consider the appropriateness of modification of the existing order. These substantial changes in circumstances warrant a dismissal of this portion of the writ of certiorari as improvidently granted.

In the event that the Court finds it appropriate to decide the merits of the rule as it existed at the time of trial, the decision below should be affirmed. The prior prohibition on the receipt of any literature from any source other than the publisher was inconsistent with the First Amendment's guarantees of the right to receive information, especially in view of the unavailability of many items in the MCC library and the practical and financial problems of ordering material from publishers. The government's asserted security interest in avoiding the introduction of contraband could be adequately served by inspection of incoming parcels and by reasonable limitations on quantity.

ARGUMENT

I

THE DUE PROCESS CLAUSE REQUIRES THE GOVERNMENT TO JUSTIFY BY COMPELLING NECESSITY ALL SUBSTANTIAL RESTRICTIONS AND PRIVATIONS IMPOSED UPON PRETRIAL DETAINEES.

The law has long acknowledged the limited interest of the government in restricting the liberty of persons detained pending the resolution of criminal charges:

> Upon the whole, if the offense be not bailable, or the party cannot find bail, he is to be committed to the county gaol by the mittimus of the justice. . . . ; there to abide till delivered by the due course of law. . . . But this imprisonment, as has been said, is only for safe custody, and not for punishment: Therefore, in this dubious interval between the commitment and the trial, a prisoner ought to be used with the utmost humanity, and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only. . . . 4 W. Blackstone, COMMENTARIES *300.

Despite this principle, pretrial detainees have generally been subjected to restrictions much more severe than necessary for confinement. National Advisory Commission on Criminal Justice Standards and Goals, CORRECTIONS 101, 273-277 (1973). It was not until the erosion of the "hands off" doctrine[29] of judicial

[29]Recent decisions of the Court establish that there is no longer any "iron curtain drawn between the Constitution and the prisons of this country." *Wolff v. McDonnell*, 418 U.S. 539, 555-556 (1974); see also *Procunier v. Martinez*, 416 U.S. 396, 404-406 (1974).

nonintervention in prison matters that significant progress was made toward putting this standard into practice.

From the beginning, the federal district courts held it axiomatic that the detainee could not be punished or subjected to conditions that were, in effect, punitive. Thus, one court observed that punishment of detainees was inconsistent "with the Fourteenth Amendment to the Constitution, which forbids the deprivation of liberty without due process of law. . . . 'Punishment' cannot be justified without a judicially-determined finding of guilt; in other words, pre-trial detainees may not be 'punished' for crimes charged against them but not yet proved against them." *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F.Supp. 676, 685-686 (D.Mass. 1973), *affirmed on other grounds*, 494 F.2d 1196 (1st Cir.), *cert. denied* sub nom. *Hall v. Inmates of Suffolk County Jail*, 419 U.S. 977 (1974). Therefore, "they are not to be subjected to any hardship except those absolutely requisite for the purpose of confinement only, and they retain all the rights of an ordinary citizen except the right to come and go as they please. . . ." *Jones v. Wittenberg*, 323 F.Supp. 93, 100 (N.D. Ohio 1971), *affirmed on other grounds* sub nom. *Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972). Detention after a bail hearing to assure presence at trial justifies no restrictions beyond the fact of incarceration. "Subjecting a detainee to gratuitous and wholesale deprivation of rights which are unrelated to insuring his presence at trial offends the requirements of due process of law. . . . Even assuming [that conditions are not cruel and unusual] . . . , jail administrators are not simply free to disregard the fact that

pretrial detainees are not convicted criminals." *Brenneman v. Madigan,* 343 F.Supp. 128, 137, 138 (N.D.Cal. 1972).[30]

This line of analysis has been overwhelmingly applied by the courts of appeals which have reviewed pretrial conditions cases. As Judge Wisdom has said, "[a] government may hold a citizen without showing that he has done wrong, but it may not punish him without proof." *Miller v. Carson,* 563 F.2d 741, 746 (5th Cir. 1977). Where imprisonment is imposed prior to conviction, incarcerating officials conduct only a "temporary holding operation. . . . Punitive measures in such a context are out of harmony with the presumption of innocence." *Anderson v. Nosser,* 438 F.2d 183, 190 (5th Cir. 1971), *reaffirmed on rehearing in pertinent part,* 456 F.2d 835, 841 (5th Cir. *en banc*), *cert. denied* sub nom. *Nosser v. Bradley,* 409 U.S. 848 (1972).[31]

[30]These principles have been consistently applied by the district courts. *E.g., Ahrens v. Thomas,* 434 F.Supp. 873, 897 (W.D.Mo. 1977), *affirmed in pertinent part, reversed on other grounds,* 570 F.2d 286 (8th Cir. 1978); *Dillard v. Pitchess,* 399 F.Supp. 1225, 1232-1233 (C.D.Cal. 1975); *Cudnik v. Kreiger,* 392 F.Supp. 305, 311 (N.D. Ohio 1974); *Wilson v. Beame,* 380 F.Supp. 1232, 1237 (E.D.N.Y. 1974); *Inmates of Milwaukee County Jail v. Peterson,* 353 F.Supp. 1157, 1160 (E.D.Wis. 1973); *Hamilton v. Love,* 328 F.Supp. 1182, 1191-1192 (E.D.Ark. 1971); *Davis v. Lindsay,* 321 F.Supp. 1134, 1139 (S.D.N.Y. 1970); *Seale v. Manson,* 326 F.Supp. 1375, 1379 (D.Conn. 1971); *Tyler v. Ciccone,* 299 F.Supp. 684, 687 (W.D.Mo. 1969).

[31]See also *Norris v. Frame,* Docket No. 78-1090 (3d Cir. Oct. 31, 1978); *Campbell v. McGruder,* 580 F.2d 521 (D.C. Cir. 1978); *Patterson v. Morrissette,* 564 F.2d 1109 (4th Cir. 1977); *Duran v. Elrod,* 542 F.2d 998, 999-1000 (7th Cir. 1976); *United States ex rel. Tyrrell v. Speaker,* 535 F.2d 823, 827 (3d Cir. 1976); *Taylor v. Sterrett,* 532 F.2d 462, 470 n.11 (5th Cir. 1976); *Inmates of San Diego County Jail v. Duffy,* 528 F.2d 954, 957 (9th Cir. 1975); *Detainees of Brooklyn House of*

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These cases do no more than apply the principle, long recognized by the Court, that the accused has a special status based on the due process prohibition on punishment prior to conviction and the presumption of innocence. The principles, like the right to a jury trial and the right to counsel, are "fundamental to the American scheme of justice," *Duncan v. Louisiana,* 391 U.S. 145, 149 (1968), and are "necessary to an Anglo-American regime of ordered liberty." *Id.* at 150 n.14; see also *Gideon v. Wainwright,* 372 U.S. 335, 343-344 (1963). The right to reasonable bail before trial "serves to prevent the infliction of punishment prior to conviction," and "unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Stack v. Boyle,* 342 U.S. 1, 4 (1951). If, however, the conditions of pretrial release or the amount set as bail cannot be met by the accused and he is held in custody, he may not be treated as if he were convicted. *McGinnis v. Royster,* 410 U.S. 263, 273 (1973);[32] see also *Ingraham v. Wright,* 430 U.S. 651, 671-672 n.40 (1977); *Bounds v. Smith,* 430 U.S. 817, 840 (1977) (Rehnquist, *J.*, dissenting).

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Detention v. Malcolm, 520 F.2d 392, 397 (2d Cir. 1975); *Rhem v. Malcolm,* 507 F.2d 333, 336 (2d Cir. 1974). The only decision to the contrary is *Feeley v. Sampson,* 570 F.2d 364 (1st Cir. 1978); but see *DiMarzo v. Cahill,* 575 F.2d 15, 20 (1st Cir.), *cert. denied* sub nom. *Hall v. DiMarzo,* 47 U.S.L.W. 3301 (U.S. Oct. 31, 1978).

[32]In *McGinnis v. Royster,* 410 U.S. 263 (1973), the unavailability of rehabilitation programs to the detainee resulted in the denial to him of good time credit against his post-conviction sentence for his period of pretrial incarceration. The Court stated that "it would hardly be appropriate for the State to undertake in the pretrial detention period programs to rehabilitate a man still clothed with the presumption of innocence." 410 U.S. at 273. It would be anomalous to deny the detainee the benefits of post-conviction custody while inflicting upon him its adverse conditions.

The government's assertion that the presumption of innocence merely allocates the burden of proof at trial and has no bearing on confinement conditions, Pet.Br. 38, therefore misapprehends the significance of the presumption. By its rejection of the applicability of the presumption of innocence here, the government implies that it may do more than what is necessary to restrain the accused for purposes of assuring his appearance at trial. Thus, while it rhetorically acknowledges that it may not punish pretrial detainees, Pet.Br.23, 39-40, the government's position permits what is, in effect, punishment to be inflicted unrelated to a finding of guilt. The argument is simply contrary to established principle.[33]

To protect what is "[f]undamental to the Anglo-American jurisprudence of criminal law, . . . that an individual is to be treated as innocent until proven guilty by a jury of his or her peers," Pet.App.11a, the court of appeals examined the government's justification for the practices challenged by respondents. The court reasoned that those limitations on liberty which are inherent in the fact of confinement are justifiable and that because the preservation of the institution's security was integrally related to the safe custody of

[33]The government's sole support for its assertion is dicta in a footnote in *Hampton v. Holmesburg Prison Officials*, 546 F.2d 1077, 1080 n.1 (3d Cir. 1976), that the presumption is of no significance for pretrial detention conditions. The above-cited authorities show that the footnote is incorrect because based on too limited a view of the presumption. Further, the Third Circuit has, by implication, rejected the dicta, finding that detainees are entitled to more favorable conditions than those enjoyed by convicted people because detainees may not be punished. *Norris v. Frame, supra*, Docket No. 78-1090, slip op. at 7-8 (3d Cir. Oct 31, 1978).

detainees, some privations were justified as incident to this security interest. There remained "substantial" rights, however, the restriction of which was not inherent in or necessitated by the fact of confinement or the need for security. These substantial rights, said the court of appeals, may be totally denied or restricted only upon a showing that a compelling governmental interest necessitated the limitation. The restriction or condition imposed by the government to protect a compelling interest was required to be related in scope to the interest so as to minimize interference with the substantial right of the detainee. The actual method of regulation was left to the discretion of prison officials, but cost or administrative convenience might not justify a regulation which was overbroad. Pet.App.2a, 11a-13a.

Although the government acknowledges that "there are significant differences . . . between the due process rights of convicted inmates and pre-trial detainees," Pet.Br.16-17, it quarrels with the test utilized by the court below to determine whether a restriction or condition constitutes punishment. Pet.Br.26, 44-46. The government argues that, insofar as certain of the deprivations suffered by respondents involve matters that are not normally viewed as fundamental rights for persons who are not incarcerated, the court below erred in applying a compelling interest standard rather than requiring a mere reasonable relationship. Pet.Br. 44.[34] The government concedes, however, that restric-

[34]The government's reliance on *Jackson v. Indiana*, 406 U.S. 715 (1972), and *McNeil v. Director, Patuxent Institution*, 407 U.S. 245, 249-250 (1972), is misplaced. Both cases involved required procedural protections, one for commitment to render a person competent to stand trial, the other to determine competency to stand trial. By contrast,

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tions placed on fundamental rights must meet the compelling interest test. Pet.Br.30-31. This argument, however, ignores the nature of the right at issue: the fundamental right of a presumptively innocent detainee not to be punished without first being convicted. It ignores the fact that the detainee, by the mere fact of incarceration, has already been subjected to an abrogation of the ordinary conditions of life. Detention, although intended merely to ensure the detainee's presence for trial, is in fact similar in many of its basic features to what is imposed upon those convicted of crime. To limit this impact, the confinement must be kept strictly within bounds of necessity or the confinement becomes punitive in law.[35] Thus, in *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168-169 (1963), the Court stated that a sanction which is justified in nonpunitive terms becomes punitive insofar as it "appears excessive in relation to the alternative purpose assigned. . . ."

Nevertheless, the court of appeals did not, contrary to the government's characterization, Pet.Br.25, 27, 35,

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cases dealing with conditions of confinement for those civilly committed have required that only the least restrictive conditions be imposed. See, *e.g., Ashe v. Robinson,* 450 F.2d 681, 685 (D.C. Cir. 1971); *Covington v. Harris,* 419 F.2d 617, 623-4 (D.C. Cir. 1969); *Eubanks v. Clarke,* 434 F.Supp. 1022, 1028 (E.D.Pa. 1977); *Wyatt v. Stickney,* 344 F.Supp. 387, 396 (M.D.Ala. 1971), *affirmed in relevant part, remanded in part, reversed in part* sub nom. *Wyatt v. Aderholt,* 503 F.2d 1305 (5th Cir. 1974); *In re Jones,* 338 F.Supp. 428, 429 (D.D.C. 1972).

[35]People who are ultimately acquitted of the criminal charges against them can never be made whole with respect to the consequences of custody. Therefore, if the presumption of innocence means anything, it must necessitate the minimization of hardships caused by confinement.

39, 40, 46, require all privations to be justified by a compelling interest; only those that are "substantial" must be so justified. Pet.App.2a.[36] This limitation is significant and meaningful and protects jail administrators from having to defend every detail of institutional routine at this level of constitutional scrutiny. Thus, the court of appeals found insubstantial the right of visitors to have access to unlocked lavatories and the rights of detainees to possess typewriters and to be attired in clothing other than the institution's one-piece jumpsuits. Pet.App.15a, 33a, 34a.[37] The court of appeals was extremely selective in applying the compelling interest test, reserving it for what were substantial, if not fundamental, deprivations of liberty[38]—anal and genital cavity inspections and unobserved room searches implicating the Fourth Amendment requirement of reasonableness; the "draconian" restrictions on personal property and the severe infringement on privacy and dignity due to overcrowding implicating the Fifth Amendment; and the

[36]The government's professed fear of the "broad sweep" of the court of appeals' standard rests on its failure to acknowledge this "substantiality" limitation.

[37]The government's belief that the court of appeals' approval of the ban on typewriters implies that the compelling interest standard is not "to be applied vigorously," Pet.Br.40 n.32, again reflects its misapprehension of the substantiality standard.

[38]The issues presented by this case do not require the Court to define with precision the line between those claims which involve substantial constitutional rights and those which do not, since the questions presented to the Court clearly involve substantial rights.

limitations caused by the "publisher only" rule implicating the First Amendment.[39]

II

OVERCROWDING BY DOUBLE-CELLING AT THE MCC IS VIOLATIVE OF THE DUE PROCESS CLAUSE.

The court of appeals agreed with the district court, Pet.App.17a-19a, that, based on an appraisal of the totality of the conditions at the MCC, forced double occupancy of cells caused overcrowding and fundamental denials of decency, privacy, personal security, and, simply, "civilized humanity." Pet.App.211a. The absence of any substantial justification, Pet.App.19a, for the overcrowding resulted in conditions which were, in effect, punishment, and constituted a violation of the Due Process clause.

It was undisputed that the cells at the institution were explicitly designed and constructed for only one person each. As Paul Silver, the MCC architect, testified, "to try to convert [a cell] into a two-person room [is] a clear violation of the capability of that space." A.9. The

[39]The government presentation acknowledges that pretrial detainees may possess rights that are "deeply rooted in this Nation's history and tradition," Pet.Br.34, that even if not fundamental, restrictions imposed upon them should be examined with enhanced scrutiny under the due process clause. Pet.Br.34-35. The government agrees that rights to privacy and dignity may be included in this category. See *infra* at 46-47. In this section of our brief, we have examined the constitutional significance of the presumptively innocent detainee's right not to be punished prior to conviction. The history of that right shows that it is basic to our tradition and jurisprudence, and *a fortiori* protected from unnecessary infringements by the enhanced scrutiny doctrine.

effects of this violation were catalogued by the district judge on his tour and are readily apparent from an inspection of the architectural plans and the gross physical features of the rooms.

Because the MCC cells are approximately 75 square feet in area, double-celling provides only 37.5 square feet per person, an amount of space which numerous courts have found to be inadequate to provide minimal privacy and space for a prisoner, whether convicted or a detainee.[40]

Standards promulgated by organizations concerned with corrections and the management of prisons have also universally condemned housing as confined as the double-occupied MCC cells.[41] The Government itself

[40]*Campbell v. McGruder*, 580 F.2d 521, 537 and n.29 (D.C. Cir. 1978) (48 square feet per inmate required); *Battle v. Anderson*, 564 F.2d 388, 395 (10th Cir. 1977) (60 square feet per inmate); *Chapman v. Rhodes*, 434 F.Supp. 1007, 1021 (S.D. Ohio 1977) (on the facts, prohibited double-celling of convicted inmates in 60 square feet in a new penitentiary); *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F.Supp. 676, 690 (D.Mass. 1973), *affirmed as to remedy*, 494 F.2d 1196 (1st Cir.), *cert. denied* sub nom. *Hall v. Inmates of Suffolk County Jail*, 419 U.S. 977 (1974), *reaffirmed as to remedy*, 518 F.2d 1241 (1st Cir. 1975) (88 square feet).

[41]American Public Health Association, STANDARDS FOR HEALTH SERVICES IN CORRECTIONAL INSTITUTIONS 62 (1976) (60 square feet per person); American Correctional Association, MANUAL OF STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS 4142 (1977) (one inmate per cell with at least 60 square feet of cell space if inmates are locked in less than 10 hours per day; at least 80 square feet if they are locked in more than 10 hours per day); National Sheriffs' Association, A HANDBOOK ON JAIL ARCHITECTURE 63 (1975) (70 to 80 square feet for single room occupancy); National Clearinghouse for Criminal Justice (70 square feet); cited in *Battle v. Anderson*, 564 F.2d 388, 395 (8th Cir. 1977); National Advisory Commission for Criminal Justice Standards and Goals, CORRECTIONS, Standard 11.1 at 358 (1973) (80 square feet); United Nations Congress on the Prevention of Crime and the

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has consistently opposed the housing of two people in an area as small as MCC cells.[42] As the judge observed, in a cell of this size, there is no room for two people to walk about. The presence of a bed, a sink, a toilet, a desk, and two chairs leaves only a narrow aisle for movement, requiring that each detainee stay within a few feet of the other in "unwanted intimacy" when both are in the cell. Pet.App.206a. Jutting into the middle of the room is an uncovered toilet, a "stark centerpiece," Pet.App.211a. During lock-in hours, an inmate need-

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Treatment of Offenders, STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS AND RELATED RECOMMENDATIONS §9(1) (1955) (single cell occupancy recommended).

[42]The Chief of Facilities Development for the Federal Bureau of Prisons said that without 50 square feet of space, excluding the space occupied by furniture, in which an inmate might move about, the cell cannot be considered safe, fit for habitation, or conducive to achieving penological goals. *Campbell v. McGruder*, 580 F.2d 521, 537 n.29 (D.C.Cir. 1978). Five years before the MCC opened, the Federal Bureau of Prisons warned that when double-celling is allowed to exist, "both the facility and the personnel are overworked and minimum standards cannot be met." United States Bureau of Prisons, THE JAIL: ITS OPERATION AND MANAGEMENT 102 (1970). The active participation of the Bureau in the drafting of the 1966 American Correctional Association Standards, which prohibited double-celling and which require at least 50 square feet of living space per inmate, has been noted by courts. See *Detainees of Brooklyn House of Detention v. Malcolm*, 520 F.2d 392, 396 n.5 (2d Cir. 1975).

In its draft standards, the Department calls for single cells of at least 60 square feet (70 square feet where detainees spend more than 10 hours per day in the cell). United States Department of Justice, DRAFT FEDERAL STANDARDS FOR CORRECTIONS, Standard 004 at 10 (1978). While the government attempts to disclaim the Draft Standards on grounds that they do not set constitutional minima, Pet.Br.54-55 n.43, the standards are intended "to provide guidelines for the decent and humane operation of our country's corrections and detention facilities." Introduction to DRAFT FEDERAL STANDARDS at 2.

ing to urinate or defecate was required to do so within a few feet of his cellmate, Pet.App.206a, and the other was forced to endure any "foul odors." Pet.App.211a.[43]

Quite apart from the lack of space, the shape and construction of the cell—designed for one person—created actual physical discomfort when more than one inmate was placed in it. To accommodate a second person, the institution installed bunk beds. When the bed was placed against one wall, the vent blew air about a foot above the person in the upper bunk so that the detainee sleeping there could not sit up in bed, lift his legs, or rest or sleep on his side without exposure to the cold air. To avoid this result, inmates blocked the vents, interfering with proper ventilation and making the cells "musty and unpleasant" smelling. Pet.App. 206a-207a. (The alternative arrangement—placing the bed against the opposite wall—would not only have resulted in the bed's blocking the window, but would have placed it only inches from the open toilet.)

The conversion to a double bunk required removal of the clothing storage drawer from beneath the original single bed. Only one drawer was left in the cell, and frequently no drawer was allowed to remain, denying the inmates any place to keep their clothing; shelf space was rendered inadequate for toilet articles and other items.

[43]The impact of this denial of privacy with respect to bodily functions is widely acknowledged:

> [S]ocial systems have given symbolic importance to certain conventionally designated areas of privacy. Thus in our culture the excretory functions are shielded by more or less absolute privacy, so much so that situations in which this privacy is violated are experienced as extremely distressing, as detracting from one's dignity and self-esteem. Fried, *Privacy*, 77 Yale L.J. 475, 487 (1968).

Inmates were assigned to cells without consideration of age, physical or emotional health, psychological condition, or level of aggressiveness, and initial cell assignments were made without any information about the inmate.[44] Thus, the court also found that double-celling threatened "personal security." Pet.App.211a.[45]

The court's decision rested not only on its finding that the rights of privacy, dignity, and personal safety were violated by these conditions, but also on the obvious fact that overcrowding impaired the functioning of the multipurpose rooms—the keystone to the operation of the modular unit system. The court concluded, not surprisingly, that those areas in which the inmates engaged in all indoor recreational and group social, educational, and religious activities because of the absence of central facilities were rendered "congested, noisy, and unworkable for their intended uses." Pet.App.207a; see Pet.App.18a. Three pieces of exercise equipment could not support the needs of a population grown beyond its intended size.

[44]The government itself has recognized the danger of indiscriminately housing inmates together:

> The facility classification committee should carefully evaluate each inmate before assigning him/her to a multiple occupancy cell for the purpose of ensuring the protection of the individual being assigned as well as the protection of the other inmate(s) already assigned to the cell. DRAFT FEDERAL STANDARDS FOR CORRECTIONS, Standard 005 discussion at 10.

[45]The judge's finding that personal security was threatened was supported by uncontradicted evidence produced at later proceedings. On the night-time shifts, only one officer was assigned to cover the two units on a floor. The only way to attract the guard's attention from inside the locked cell was to bang on the door; often, half an hour passed before the guard responded. Tr. 1033-34, 1154-55; see J.A. 621; Pet.App.179a.

There were too few chairs and tables for all inmates to eat their meals in the multipurpose rooms, and for meals inmates would have to return to the cells, with their open toilets and often only one chair. Pet.App. 207a. The judge found that the effect of overcrowding on the multipurpose rooms compounded the regime of idleness. Pet.App.209a.

Based on these uncontroverted facts, supplied largely by the government itself,[46] and the visit, the court found that there appeared no genuine disputes as to material facts preventing a decision on a motion for summary judgment, Pet.App.203a, and concluded that, "taking all the facts together," double-celling at the MCC was unconstitutional. Pet.App.207a.

The government's assertion, Pet.Br.50-53, that the Menninger affidavit created triable issues of fact is untenable. The court assumed the truthfulness of the factual assertions in the affidavit, but concluded that they were offset by other indisputable facts. Pet.App. 208a-209a. Dr. Menninger's failure to observe actual psychiatric destruction or evidence of aggressive or deviant sexual behavior at the MCC[47] might be

[46]The court had before it the admissions in the return to the amended petition; two of Warden Taylor's affidavits dated October 19, 1976, A.21-27, and December 29, 1976, A.33-35; the government's statement pursuant to Local Rule 9(g), United States District Court, Southern District of New York, listing the relevant undisputed facts (S.A.); and the architectural plans of the institution, attached as Exhibit 1 to the 9(g) statement.

[47]Later at trial, the government's own experts testified that overcrowding had an adverse effect on the population. Norman Carlson, Director of the Bureau of Prisons, testified that overcrowding increases tensions and is a factor in prison violence. J.A.1693-1694. Even Dr. Menninger admitted that overcrowding causes stress. Tr.2754. The former warden of the Federal Detention Headquarters at

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material if respondents were convicts entitled only to the protection of the Eighth Amendment's prohibition on cruel and unusual punishment. Where pretrial detainees are involved, however, Eighth Amendment scrutiny is inappropriate, see *Ingraham v. Wright, supra,* 430 U.S. at 671 n.40, and the absence of extreme psychological damage is simply not material. As the district court observed in another context, "constitutional injury may occur short of emotional trauma leaving scars or requiring treatment." Pet.App.150a.

The court of appeals agreed with the district court, concluding that "infringements on privacy and personal dignity," Pet.App.18a, caused by double-celling in light of the government's failure "to show any substantial justification for [it]," Pet.App.19a, were "so 'dehumanizing as to constitute an additional hardship beyond the need for custody in violation of the detainee's due process and equal protection rights.' " Pet.App.17a.

The government concedes that the implicated privacy right represents an aspect of individual liberty that it "would not denigrate." Pet.Br.48. It further acknowledges that "the interest in privacy and human dignity implicated by housing pretrial detainees . . . in relatively confined, non-private quarters" may be among "a narrow category of interests" which the Court may conclude are not fundamental but "are so profoundly anchored in the traditions of our society that their restrictions must be examined with particular care by

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West Street, Louis Gengler, gave virtually identical testimony when he testified in *Detainees of Brooklyn House of Detention v. Malcolm,* 520 F.2d 392, 396 n.4 (2d Cir. 1975).

the courts. . . ." Pet.Br.48.[48] This concession would be well taken, even if the government's contention were correct that the right involved is solely one of "literal, physical separation of individuals. . . ." Pet.Br.46-47.[49] However, the government refuses to acknowledge that what is at issue is far more than double-celling *per se,* but includes the overall consequences to detainees who are housed at the jail. As the district judge concluded, not only did double-celling cause qualities of "threat, nausea and degradation, . . . social stigma and humiliation," Pet.App.211a, but basic environmental conditions were distorted by overcrowding. This uninterrupted intrusion and perversion of facilities is a far more serious infringement on dignity than is conveyed by the government's characterization of housing in relatively confined non-private quarters. Thus, on the record made in the district court, the government's practices at the jail violate both the fundamental right

[48]In light of the government's concession that the intrusion upon the privacy and dignity interest of the detainees might deserve enhanced scrutiny, the government's position that the Eighth Amendment standard should have been applied here to deny relief, Pet.Br.54 n.42, creates an inconsistency explicable only by its inability to justify the overcrowding. Furthermore, the government's reference to *Feeley v. Sampson,* 570 F.2d 364 (1st Cir. 1978); *Loe v. Armistead,* 582 F.2d 1291 (4th Cir. 1978); *Hampton v. Holmesburg Prison Officials,* 546 F.2d 1077 (3d Cir. 1976); and *Duran v. Elrod,* 542 F.2d 998, 999-1000 (7th Cir. 1976), as authority for the applicability of the Eighth Amendment standard, Pet.Br.24, 54 n.42, is at odds with the later concession that these cases find greater rights belonging to detainees. Pet.Br.56.

[49]Even if separateness were the issue, the absence of a precedent of the Court identifying it as part of the right to privacy for pretrial detainees is of no significance, for the issue has not previously been considered. See, *e.g., Moore v. City of East Cleveland,* 431 U.S. 494, 500-501 (1977) (where the Court gave initial consideration to the extended family concept).

of privacy and dignity and the equally fundamental right of presumptively innocent detainees not to be subject to conditions so harsh as to constitute punishment.

Even accepting the government's suggestion that only the enhanced scrutiny test of *Moore v. City of East Cleveland,* 431 U.S. 494, 500-503 (1977), might be applicable, Pet.Br.48, the court of appeals decision is easily sustainable. The plurality opinion in *Moore* states that the full scope of the liberty guaranteed by due process is a "rational continuum" which includes a freedom from substantial arbitrary impositions, and requires that the reasons given for abridgement of certain interests be "carefully scrutinized." 431 U.S. at 502.

In this case, the sole reason given for the intrusion on the rights of privacy and decency by overcrowding is fiscal and administrative concerns. Pet.Br.42, 48, 49. However, it is axiomatic that "vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them," *Watson v. City of Memphis,* 373 U.S. 526, 537 (1963), or that a denial of rights "may be more convenient for jail administrators." *Estelle v. Williams,* 425 U.S. 501, 505 (1976). When asserted as the sole justification for an infringement of constitutional rights, cost and administrative convenience have repeatedly been rejected. *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 647 (1974); *Vlandis v. Kline,* 412 U.S. 441, 451-452 (1973); *Stanley v. Illinois,* 405 U.S. 645, 656 (1972); *Bell v. Burson,* 402 U.S. 535, 540-541 (1971); *Goldberg v. Kelly,* 397 U.S. 254, 265-266 (1969). Claims of cost and inconvenience asserted

as the sole justification for a governmental practice have generally prevailed only in cases involving the minimal scrutiny or "rational basis" test applied to social and economic legislation under equal protection analysis. See, *e.g., Weinberger v. Salfi,* 422 U.S. 749, 776-780 (1975).[50] Cost and convenience, when asserted as the sole justification for infringement of constitutionally protected interests, are *a fortiori* inadequate when alternative means are available to meet the government's objectives at minimal cost and inconvenience. Thus, in *Vlandis v. Kline, supra,* the Court, citing the procedures created administratively after the district court's action in that case, noted that a state was able to establish reasonable criteria for determining bona fide in-state residency without resort to the irrebuttable presumption of non-residency it had initially established. 412 U.S. at 453-454. See also *Goldberg v. Kelly, supra,* 397 U.S. at 265-266. Here, similarly, as the court of appeals found, Pet.App.19a, the government complied with the order to cease double-celling by eliminating the "cadre." Indeed, after

[50]Even if the rights asserted by respondents are entitled only to the protection of the enhanced scrutiny test, see *Moore v. City of East Cleveland, supra,* they are accorded greater protection than that afforded by minimal rationality. The closest analogy in equal protection analysis involves cases of gender-based discrimination, which utilize a standard of governmental justification more exacting than minimal rationality. *Reed v. Reed,* 404 U.S. 71 (1971). Whether this standard is viewed as a "middle tier" approach or a more critical application of the "rational basis" test is immaterial. See *Craig v. Boren,* 429 U.S. 190, 210-211n. (1976) (Powell, J., concurring). These cases "have rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications." *Id.* at 198; see also *Califano v. Goldfarb,* 430 U.S. 199, 205 (1977); *Frontiero v. Richardson,* 411 U.S. 677, 690-691 (1973).

entry of the district court order, the government advised the court that it could comply within 60 days by the normal expiration of sentences of "cadre" members, J.A.3043, the 103 sentenced inmates retained at the institution for the purpose of performing certain jobs.[51] All but 21 of the "cadre" were transferred to other facilities, and detainees and inmates held on writs of habeas corpus performed the jobs "cadre" members had previously done. Pet.App.19a.

The government never sought from the district court a stay of the order prohibiting double-celling, and the order has been in effect since March 1977—almost two years. Furthermore, the district court order, as modified by the court of appeals, ending overcrowding in the dormitories and terminating housing in balconies and common areas has been in effect since August 28, 1978, and the government has not made use of that part of the order which permits double-celling for up to 10 days on an emergency basis. Pet.App.51a. During this entire period, the government has never made a showing that it was not able to produce detainees for court appearances or that additional facilities would need to be constructed as a result of the court order.

In view of the government's compliance with the order below and the absence of any showing of any serious expense or disruption resulting therefrom, the government's claims of excessive costs and inconvenience are open to question. Moreover, it was the government itself that chose to plan and build a pretrial facility

[51]Since these inmates were not involved in judicial proceedings, but were retained at the MCC at the government's request, they could be removed from the institution for service of their sentences at other institutions.

based on the modular system intended for a population of a specific size. The articulated plan was to humanize staff-inmate relations and to afford inmates greater privacy and freedom than jails of earlier construction. Pet.App.5a. The government's claim of a substantial administrative interest in its *ad hoc* departure from its own carefully considered prescriptions for administration of the MCC cannot prevail in the face of the substantial rights asserted by respondents, the findings of the courts below, and the extensive record upon which they relied.

III

THE RECORD ESTABLISHES THAT THE RESTRICTIONS LIMITING RIGHTS OF DETAINEES AT THE MCC WERE GREATER THAN NECESSARY TO SATISFY THE GOVERNMENT'S SECURITY INTEREST.

The government, despite extensive safeguards to prevent contraband from entering the prison, conducted visual anal and genital inspections of inmates after every contact visit and prevented detainees from observing the thorough searches of their cells and all belongings, including legal papers. Further, the government imposed an absolute prohibition on receipt, possession, and use of all personal property from outside the institution and prevented respondents from receiving books and other printed materials from sources other than the publisher. See *infra* at 54ff. To determine the constitutionality of each regulation or

procedure, the courts below examined the affected constitutional right, the governmental interest in security, and the extent of the privation. As to each of the four listed matters, the only ones raised by the government here,[52] the privation was found by the courts below to be so broad as to exceed what was justified.

Relying on *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977), the government asserts that insufficient deference was given to the opinions of its witnesses and that there was no substantial evidence to indicate "that the 'officials [had] exaggerated their response' to the security risks. . . ." Pet.Br.58-59. Examination of the government's brief in the context of this record demonstrates that the government seeks to imbue a claim of security with talismanic significance such that its mere assertion invokes an extraordinary degree of deference. In effect, the government advocates a return to the judicial "hands off" doctrine.

The government's substantial reliance on *Jones* is inappropriate because the Court, in *Jones,* was not required to examine the rights of pretrial detainees. In that case, the particular and restrictive circumstances of the penal confinement of those "who have been found to have violated one or more of the criminal laws," *id.*, 433 U.S. at 129, was of concern. Not only is the status of the prisoners here different from that involved in *Jones,* but the rights, too, are radically different. *Jones* concerned an inmate labor union, the purpose of which was to engage in collective action to

[52]Overcrowding is not discussed in this section because no security interest is raised by the government to justify it. Pet.Br.46.

advance the interests of convicts *vis-a-vis* correctional officials. By contrast, the rights involved here do not raise the specter of mass action within the institution. Compare *Procunier v. Martinez,* 416 U.S. 396, 420-422 (1974); *Johnson v. Avery,* 393 U.S. 483, 486-487 (1969); *Ex parte Hull,* 312 U.S. 546 (1941). They are entirely personal and individual rights, each of which is protected by a specific constitutional provision.

In any case, the courts below accorded due deference to the opinions of jail officials, as *Jones* suggests.[53] After consideration of the substantial evidence in the record that government regulations asserted to aid security frequently were far broader than the interest required, the courts below responded to protect constitutional rights only by limiting the privations which were the most restrictive.[54] A specific discussion of the issues follows.

[53]For example, the district court deferred to the government's decision not to use a central gymnasium, to require clergymen to conduct religious services in each unit rather than a central chapel, to prohibit movement to the general library and the commissary, and to use correctional officers of one sex to guard inmates of the opposite sex. Pet.App.98a, 100a, 108a, 111a, 183a.

[54]We would also note that to the extent the Court was concerned with a problem of federalism in *Jones*, that concern is not a factor here. Indeed, a federal court's concern with the very jail housing federal prisoners is appropriate. See *Wayne County Jail Inmates v. Wayne County Board of Commissioners,* Civ. Action No. 173217, Opinion on Motion for New Trial and Motion to Amend Judgment (Cir. Ct., Wayne County, Michigan, July 28, 1978) at 24.

A. Visual inspections of the anal and genital cavities were humiliating and of little utility, and are therefore unreasonable on this record under the Fourth Amendment.

Detainees, as well as convicted inmates, retain the Fourth Amendment protection requiring that searches of person or property be reasonable under the circumstances of imprisonment. *United States v. Lilly,* 576 F.2d 1240 (5th Cir. 1978); *Bonner v. Coughlin,* 517 F.2d 1311, 1316-1317 (7th Cir. 1975) (Stevens, *J.*), *affirmed in relevant part on rehearing,* 545 F.2d 565 (7th Cir. 1976 *en banc*), *cert. denied,* 98 S.Ct. 1507 (1978); *United States v. Savage,* 482 F.2d 1371, 1372 (9th Cir. 1973), *cert. denied,* 415 U.S. 932 (1974); *Frazier v. Ward,* 426 F.Supp. 1354, 1366 (N.D.N.Y. 1977); see *Houchins v. KQED, Inc.,* 98 S.Ct. 2588, 2592 n.2 (1978). Here, the government concedes, as it must, that the anal and genital cavity inspection and the search procedure of which it is a part, conducted after each contact visit, implicate "notions of personal dignity and decency." Pet.Br.74. Further, the government acknowledges that the determination of whether a search is constitutionally reasonable requires attention to the total setting of the search, for if the institution's security needs can be met by a significantly less obtrusive measure than those in effect, it may be unreasonable to impose the greater restriction. Pet.Br. 74. The district judge, based on these conceded principles, found the body cavity inspections as used in circumstances at the jail to constitute "extreme measures of indignity" which were unreasonable and shocking. Thus, sustaining all the other search procedures used by the government,

including the strip search, he found the cavity inspections to be invalid. Pet.App.153a. The court of appeals affirmed the decision, finding the inspections to be of little actual utility and "in the circumstances presented by this record" a "procedure [which] shocks one's conscience." Pet.App. 30a.

The search procedure requires that after every contact visit an inmate of either sex, after removing all of his or her clothing, bend over, spread the buttocks, and display the anal cavity for a visual inspection by a correctional officer. For women inmates, a suitable position must be assumed for a visual inspection of the vaginal cavity. Men must raise their genitals for a similar inspection. Because of pressures of time, these inspections, which the district court characterized as "affronts, repulsive in the most evident respects," Pet.App.153a, are frequently made in the presence of other inmates. A.77. Nor does the matter stop there: the uncontradicted expert testimony established that cavity searches inevitably engendered psychological sadism, with a fear by inmates of sexual assault. A.49. Further, uncontradicted testimony credited by the district court was that guards at the MCC did on occasion make threats of physical abuse. Pet.App. 149a. Such fears as are engendered by the search are factors in its unreasonableness and invalidity. See *United States v. Martinez-Fuerte,* 428 U.S. 543, 558 (1976); *United States v. Ortiz,* 422 U.S. 891, 894-895 (1975). Indeed, a strip search is itself an indignity, *United States v. Guadalupe-Garza,* 421 F.2d 876, 878 (9th Cir. 1970), constituting an "extensive invasion of privacy." *United States v. Asbury,* No. 78-1149, slip op.

5137, 5140 (2d Cir. Nov. 13, 1978). A vaginal perusal is a "serious invasion of personal privacy and dignity." *Henderson v. United States,* 390 F.2d 805, 808 (9th Cir. 1967).

The humiliation and indignities caused by these searches were testified to by experts and inmate witnesses. A.36-37, 41, 45, 48. Not disputing the indignity involved, the government points to the testimony of its own witnesses asserting that visual inspection of genital and anal cavities is a necessary and reasonable means of discovering and deterring smuggled contraband. Pet.Br.72-73. However, the court of appeals' conclusion that the offensive search is of little actual utility, Pet.App.30a, and the evidence supporting that conclusion, put both claims to rest.[55] The credited testimony of a medically-trained prison psychiatrist was that the visual cavity inspection will disclose no contraband concealed beyond the anal sphincter muscle. Pet.App.150a. Further, if items are hidden merely between the buttocks, they would be discoverable by a mere observation of the resulting unnatural gait. A.49-50.

Furthermore, experts testified without contradiction that prevailing conditions made it virtually impossible for an inmate to hide anything in the anal or genital cavities during a visit. The experts testified that the process of inserting material into the rectum is painful and would require more time and opportunity than is

[55] The conclusion that the cavity inspection was of little utility was not based solely on the infrequency with which contraband was actually discovered, as the government asserts, Pet.Br.71, but upon the totality of the circumstances, which make concealment of contraband in the body cavities inspected virtually impossible.

available in the visiting rooms. A.49. The lack of privacy in the visiting rooms is established by the record: occupants of the glass-enclosed room are under continuous observation by a correctional officer. Pet.App.131a; J.A.1208-1209; J.A.144 para. 3.[56] This opportunity to observe visitors and inmates in the visiting room is enhanced by the correctional officer's power to control the number of people in the visiting room and by limiting the number to no more than 24. J.A.1208. Furthermore, the inmate's entrance to the visiting room from the adjoining residential unit is supervised by a correctional officer who searches the inmate as he enters the visiting room, and ushers him in. A.41; J.A.144 para. 2F; Pet.App.131a. Observation remains unlimited, for inmates are forbidden to use the locked lavatories; visitors may use them only by requesting a key from a correctional officer,[57] thus putting the officer on notice both that the lavatory is being used and of the identity of the person using it. Since the time of trial, the door to the visiting room lavatories has contained a built-in window. The visiting rooms are closely supervised,[58] and the finding that "the inmates

[56] This policy statement was attached as Exhibit C to Warden Taylor's affidavit of January 19, 1976, concerning visiting.

[57] The district judge did not consider this fact because he ruled that the lavatory should remain unlocked. Pet.App.135a. The court of appeals reversed the order, requiring use of the key, Pet.App.15a, and thus was well aware of this fact when the cavity search was held invalid.

[58] The government's assertion that visits at the MCC are "largely unsupervised," Pet.Br.76, is totally at odds with the record, and can be made only by ignoring the evidence. Furthermore, the implication that the district court found that visits are "loosely" monitored, Pet.Br.72 n.54, is simply not correct. The government's assertions are obviously the only way to avoid the inconsistency between its practice and its own standard, DRAFT FEDERAL STANDARDS FOR CORRECTIONS, discussion of

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and their visitors are in full view during the visits," Pet.App.151a, is fully supported by the record.

Uncontradicted expert testimony was that the uniforms[59] used were a factor preventing concealment of contraband in body cavities. It was virtually impossible for an inmate wearing one of these one-piece, brightly colored jumpsuits to conceal anything in the vaginal or anal cavity without removing the top of the jumpsuit, an effort which would easily be observed by the officer watching the room. A.45; see J.A.925.

The government used equally thorough procedures to search visitors, whose packages and belongings could be thoroughly searched by electronic devices, fluoroscope, and by hand by the correctional officers in the jail lobby reception area prior to reaching the visiting room. A.93; J.A.601, 1077. The correctional officer might require that an entire package or parcel, or any portion thereof, be left on the first floor of the institution. Regulations forbade the taking of food, medication, or cosmetics into the visiting rooms. J.A.144, 838, 1077-1078, 1080. In addition, as noted above, the inmate was searched before being admitted to the visiting room.

These security precautions were continued after the visit was completed by strip-searching each inmate and examining his clothing and body, including armpits, hands, mouth, and feet. Uncontradicted expert testi-

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Standard 013 at 37, which prohibits causeless random cavity searches. See Pet.Br.76 n.58.

[59]This uncontradicted testimony was not considered by the district judge, who prohibited use of the uniforms. Pet.App.168a. However, it was clearly relevant to the court of appeals' decision, which reversed the lower court as to uniforms, Pet.App.34a, and is further basis for the conclusion that the cavity search was of little utility.

mony showed that weapons and other metallic items such as coins concealed in body cavities could be detected by use of metal detectors, and drug use ascertained by urine tests given at the jail.

The district judge also considered the effect of both the strip search and the cavity inspection on deterrence. He deferred to the government's claim that the strip search might deter the introduction of contraband and permitted the continued use of that procedure for all inmates. Pet.App.153a. The court of appeals agreed, although finding even that procedure to be humiliating and degrading. Pet.App.30a. On the other hand, the district judge found that the attempt to place something in the body cavities is "an imposing challenge to nerves and agility, . . . likely to deter many or most, . . ." and therefore could not justify "these extensive and offensive aspects of the strip search." Pet.App.151a.

The court of appeals, considering the record, similarly concluded that the cavity inspection was a "gross violation of personal privacy" which was not outweighed by the government's interest in maintaining a practice of so "little actual utility." Pet.App.30a.[60]

The decision of the courts below is consistent with precedents stating that strip searches are prohibited absent the opportunity to conceal contraband,[61] or

[60]The only part of the record cited by the government, Pet.Br.72 n.54, in support of the usefulness of the inspection, was an incomplete quotation which, when read in full, does not support the government's position. A.71; see *supra* at 18, n.22.

[61]Some of the cases cited by the government, Pet.Br.72-73, to support its position present a factual basis establishing an opportunity for concealment of contraband. *Bell v. Manson*, 427 F.Supp. 450 (D.Conn. 1976) (search upon return from outside the facility for court

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cause to believe that a specific person has been involved in smuggling. *United States v. Asbury, supra,* slip op. at 5140; *United States v. Guadalupe-Garza, supra,* 421 F.2d at 879; *United States v. Smith,* 557 F.2d 1206, 1208-1209 (5th Cir. 1977), *cert. denied,* 434 U.S. 1073 (1978). Here, the courts permitted the strip search without cause, limiting only the visual cavity inspection to instances where it was based on probable cause as determined by the correctional officer.

B. Prevention of detainees' observation from a reasonable distance of frequent and random cell searches was properly held unreasonable.

Searches of individual cells and shakedowns of groups of cells were conducted frequently and randomly. Inmates, even if present on the housing unit, were generally forbidden to observe searches of their

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appearance); *Penn El v. Riddle,* 399 F.Supp. 1059, 1062 (E.D.Va. 1975) (inmate subjected to a body cavity search immediately after finding contraband on inmate's work clothing in his work area); *Hodges v. Klein,* 412 F.Supp. 896, 900-903 (D.N.J. 1976) (searches permitted whenever leaving or entering facility, after completely private contact visits, and for probable cause); *Daugherty v. Harris,* 476 F.2d 292 (10th Cir.), *cert. denied,* 414 U.S. 872 (1973) (rectal examination permitted of those leaving a maximum security institution housing many dangerous inmates where there were known instances of hidden contraband and injuries to officers). Opinions in other cases cited do not reveal the circumstances in which the challenged search was permitted. *Bijeol v. Benson,* 404 F.Supp. 595, 600 (S.D.Ind. 1975) (factual context not described; claim is merely that the searches were conducted without probable cause and without a warrant); *Giampetruzzi v. Malcolm,* 406 F.Supp. 836, 844 (S.D.N.Y. 1975) (high risk inmates searched after personal visits; search described as "strip search," but no reference to anal or genital inspection, *id.* at 844).

cells unless a particular staff member decided to permit observation. The prohibition was absolute when searches were conducted of the whole unit by teams of guards. The correctional staff frequently disregarded the rule that cells were to be left in the condition in which they were found prior to the search. Thus, inmates frequently returned to their cells to find their contents, including legal documents and bedding, strewn about in disarray. This resulted in fears by inmates that property had been removed by the searching guards. Pet.App.154a.

These search procedures and the unauthorized behavior of correctional officers were found by both courts below to be an affront to the privacy and dignity to which a detainee is entitled. Pet.App.31a, 155a. Without in any sense limiting the government's right to search extensively in the cells among the few belongings permitted inmates, the courts reasoned that if the inmate were permitted to observe the search, the correctional officers would be less likely to engage in arbitrary behavior, and grounds for suspicion of the officers or of theft or misconduct would be obviated, thus avoiding the oppressiveness of the existing procedure. Pet.App.31a, 155a.

The government argues that detainees have no privacy interest which would prevent cell searches, and therefore they have no right to observe them. Pet.Br. 78-79. The argument is misdirected, for it is not the government's right to conduct cell searches that is in issue, but the circumstances and manner in which such searches may reasonably be conducted.

The Fourth Amendment requires that searches be conducted in a reasonable manner, *United States v.*

Ortiz, 422 U.S. 891, 895 (1975); *Schmerber v. California,* 384 U.S. 757, 768 (1966), and it is clear that pretrial detainees retain some protections of the Fourth Amendment. *Bonner v. Coughlin, supra,* 517 F.2d at 1316-1317. Although searches of inmate cells may be necessary for jail security, needless procedures, especially those which gratuitously invade privacy and dignity, may render the search process punitive. *Giampetruzzi v. Malcolm,* 406 F.Supp. 836, 844-45 (S.D.N.Y. 1975). See Point I, *supra,* at 33-34, 38.

Even Warden Taylor conceded that, during searches, "it is important to preserve as much as possible the privacy and respect the privacy of the inmate." A.66. The government search procedure, rather than protecting the inmate's privacy and dignity interests, manifests disrespect for the individual.

After finding an infringement on privacy and dignity, the courts below found that the security interest in denying the inmate the right to observe the search asserted by the government was no interest at all. Specifically, the government cited the need to prevent distraction of the officer conducting the search and the destruction of contraband by swallowing it or throwing it out the window or down the toilet. Pet.Br. 77 and n.59. These fears are without basis. The windows at the jail cannot be opened. Further, the detainee may be removed from his cell or searched so as toseparate him from any contraband to avoid his swallowing it or using the toilet to dispose of it. The government also claims that the security of the guards and the institution would be risked. Pet.Br.80. However, Warden Taylor himself testified that guards didn't "necessarily mind" if the inmate observed the

search of a cell. A.66. Further, contrary to the government's assertion, Pet.Br.79, there is no requirement that the inmate be in the cell during the search, so long as he may observe from a reasonable distance. Pet.App.31a. In any event, the disruptive inmate may be removed from the scene. Pet.App.32a. As the government's own witness testified, when detainees are permitted to observe the search of their cells, the searches are conducted without excess and inmates do not become argumentative. A.73. Thus, it was established that the government's fears were exaggerated, and the decisions of the courts below were correct.

C. The total prohibition on possession and use of private property from outside the institution is a denial of a substantial right and violative of the due process clause.

Inmates of the MCC are not permitted to receive personal property or food from outside the institution. The courts below, in disapproving this prohibition, required the government only to devise reasonable regulations regarding packages. Pet.App.33a.

The government had claimed, in defense of its policy, that the ban was justified by the concern that permitting inmates to possess personal property would result in risks of thefts and inmate conflict, Pet.Br.61, and in sanitation and storage problems. Pet.Br.61 n.46. Those assertions appear now abandoned, and justifiably so in light of the government's policy of selling personal property and food from the jail commissary to inmates with sufficient money. Pet.App.164a. The only

currently asserted justification for the absolute prohibition is security—the smuggling of contraband into the institution in items of personal property or food. Pet.Br.65.

The government first asserts that the broad prohibition is reasonable because there is no constitutional interest in receiving packages. Pet.Br.62. Such a statement of the issue misses the point, however; of concern here is the total denial to inmates of all their personal property. Admittedly, the fact of incarceration and the need for safe maintenance of the jail are inconsistent with the unrestricted access to a wide variety of items of property enjoyed by unconfined persons. However, even these necessary restrictions on the accustomed use of property constitute "one of the deepest miseries of incarceration," Pet.App.158a, and, accordingly, deprivations of property should be no more stringent than the need dictates. The absolute denial of property in this case sweeps so far beyond that which is necessary for the government's legitimate purpose as to constitute punishment—a view which the government admitted in the district court. Pet.App. 165a-166a.

The government's prohibition violates not only the right of detainees to be free from punishment, but also the constitutionally protected right to use and enjoy property.[62] The right to "enjoy" property, *Lynch v.*

[62]The fundamental nature of property rights under our constitutional system has been explicitly recognized:

> . . . [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare

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Household Finance Corp., 405 U.S. 538, 552 (1972), and to "acquire, use, and dispose of" property, *Buchanan v. Warley*, 245 U.S. 60, 74 (1917), have long been recognized as integral to our conception of property. Further, ". . . it is now settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in terms of the [Fifth] Amendment." *Fuentes v. Shevin*, 407 U.S. 67, 84-85 (1972), citing *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Bell v. Burson*, 402 U.S. 535 (1971).

Fuentes v. Shevin, supra, and its progeny, stand for the proposition that such temporary, nonfinal deprivations of property must be circumscribed by procedures protecting against baseless *ex parte* seizures and providing for a prompt adversary determination of a seizure's propriety. Compare *North Georgia Finishing, Inc., v. Di-Chem, Inc.*, 419 U.S. 601 (1975), with *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974). However, the requirement of procedural due process is itself premised on the constitutional stature of the right to use property. *Fuentes v. Shevin, supra*, 407 U.S. at 86; *North Georgia Finishing, Inc. v. Di-Chem, Inc., supra*, 419 U.S. at 606. As with other constitutional rights, then, restrictions on personal property are justified only to the extent necessary to serve the

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> check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972). The precise nature of property at issue is irrelevant to the constitutional status of the right. *Fuentes v. Shevin*, 407 U.S. 67, 89-90 (1972).

compelling interests of appearance at trial and safe custody.[63]

In addition to property rights *per se*, the government's total prohibition also implicates equal protection concerns. The indigent inmate who is unable to purchase goods at the MCC commissary is denied even the right to use comparable goods he already has at home.

To justify the absolute restriction imposed here, the government, as noted, claimed security—the smuggling of weapons and food. Here, the talismanic nature of the government's security argument is most apparent. The testimony at trial designed to justify the absolute prohibition was based on the assumption that only a rule permitting unlimited entry of property and food could be the alternative to the complete bar. See A.79-80. The real point, however, is that the government has failed to consider that reasonable regulations permitting entry of specified quantities and types of goods are an appropriate accommodation—one which

[63]An illuminating factual analogy is the law regarding seizures of allegedly obscene material pending an adversary hearing on the issue of obscenity. Such seizures are limited to a single copy of each item for purposes of preservation of evidence. Mass prehearing seizures are prohibited, and indeed, if only one copy of the disputed item is available, it must be made available for copying or else returned. Compare *Heller v. New York*, 413 U.S. 483, 492-493 (1973), with *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964), and *Marcus v. Search Warrant*, 367 U.S. 717 (1961). These cases, of course, involve First Amendment questions as well as property rights, but they also show that even temporary deprivations of property for a legitimate governmental interest must be limited in scope to what is necessary to serve that purpose.

has been struck at other institutions.[64] The government's only response to this moderate position—the position taken by the courts below—is that a total prohibition may be imposed to avoid even "manageable" burdens. Pet.Br. 64 n. 48. Thus, it appears that behind the government's facade of security concerns lies an actual motive to avoid administrative inconvenience.

D. The government's proposed changes in the "publisher only" rule warrant a dismissal of the writ of certiorari as improvidently granted. Alternatively, the order below should be affirmed because the "publisher only" rule is an unjustified infringement on First Amendment rights.

When this lawsuit began, and throughout the proceedings below, the government enforced a "publisher only" rule. In its brief, Pet.Br.66 n.49, the government informs the Court that on July 17, 1978—five days before the filing of the petition for writ of certiorari—the rule was modified to permit receipt of printed material from bookstores. In addition, the brief gives notice that the Bureau of Prisons is "in the process of

[64]In addition to evidence in the present record, jail officials have recently agreed to permit receipt of personal property in litigation involving the populous pretrial detention system of New York City. Stipulations for the Entry of Partial Final Judgment, paras. A.1, E, filed December 1, 1978, in *Maldonado v. Ciuros*, 76 Civ. 2854 (S.D.N.Y.); *Ambrose v. Malcolm*, 76 Civ. 190 (S.D.N.Y.); *Forts v. Malcolm*, 76 Civ. 101 (S.D.N.Y.); *Benjamin v. Malcolm*, 75 Civ. 3073 (S.D.N.Y.); *Detainees of the Queens House of Detention v. Malcolm*, 73 C 1354 (E.D.N.Y.); *Detainees of the Brooklyn House of Detention v. Malcolm*, 73-C-261 (E.D.N.Y.).

changing the rule" to allow receipt of paperback books, magazines, and other soft-covered materials from any source. Pet.Br.66 n.49, 69 and n.51. Accordingly, in its brief, the government submits for review here only that part of the order prohibiting the bar on receipt of hard-covered books. Pet.Br.69.

While we believe that, on the facts as they existed, the rulings below were correct, the proposed modifications in the "publisher only" rule signify a material change in the circumstances. See *Sanks v. Georgia,* 401 U.S. 144 (1971). The government has never informed the district court of the proposed changes or sought a change in the ruling from the courts below. Such an application should be an appropriate way to proceed (see Rule 60(b), Fed.R.Civ.P.), rather than seeking from this Court a change in the order based on new facts. In view of these changes, the district court should be given an opportunity to determine whether the order permitting receipt of all printed material is still required, or whether some modification is warranted, *e.g.,* to require limited entry of hard-bound books from other than the publisher or to mandate some modification in the MCC library. Accordingly, it is respectfully requested that, on this issue, the writ of certiorari be dismissed as improvidently granted. In the event that the issue of the "publisher only" rule is determined on the merits, the order below should be affirmed.

The government does not dispute the First Amendment right to receive ideas and information in the form of literature or otherwise. *Red Lion Broadcasting Co. v. F.C.C.,* 395 U.S. 367, 390 (1969); *Stanley v. Georgia,* 394 U.S. 557, 564 (1969); *Martin v. Struthers,* 319 U.S. 141, 143 (1943). The government agrees further,

Pet.Br.30-31, that fundamental rights may be limited only by a compelling governmental interest, to the extent necessary to protect that interest.

While not disputing that inmates, both convicted and pretrial, have a First Amendment right to information, including books and other printed materials, *Morgan v. LaVallee,* 526 F.2d 221, 224 (2d Cir. 1975); *Owens-El v. Robinson,* 442 F.Supp. 1368, 1388-1389 (M.D.Pa. 1978); *Inmates of Milwaukee County Jail v. Peterson,* 353 F.Supp. 1157, 1169 (E.D.Wis. 1973), the government enforced the "publisher only" rule, asserting the possibility that contraband would enter the institution in books. Although Warden Taylor asserted that the detection of contraband would require a search between pages, which would be difficult and might require destruction of the book, he gave no reason for not attempting to use electronic devices and fluoroscopes or limiting the number of books sent to an inmate—procedures used in other institutions.

The record in this case and the government's concessions before the Court demonstrate that the prohibition was an exaggerated response to the government's interest. Warden Taylor's own affidavit makes a distinction between hard- and soft-covered books, A.24, as does the newly proposed plan to permit soft-covered books and magazines to enter the institution from any source, Pet.Br.69. Furthermore, the modification of the regulation to permit receipt of books from bookstores without limit, Pet.Br.66 n.49, demonstrates that even as to hard-cover books, the security risk is not compelling. United States Department of Justice, DRAFT FEDERAL STANDARDS FOR CORRECTIONS, Standard 002 at 63 (1978).

While not to be disparaged, the security interest does not justify an infringement on the First Amendment as overbroad as the one the government chose to impose. The asserted security interest ultimately relies upon the government's unwillingness to inspect adequately the printed matter sent into the jail. As such, it amounts to no more than a claim of administrative inconvenience, an interest insufficient to overcome so severe a limitation on fundamental rights. *Estelle v. Williams, supra,* 425 U.S. at 505; see *Johnson v. Avery, supra,* 393 U.S. at 486, 488.

As the court below found, the severity of the restriction was not cured by alternative means of access to printed matter, Pet.App.26a-27a, because these sources were inadequate. Many books sought by inmates are not available from the library. If inmates are limited to the books in the MCC library, the government becomes the arbiter of what may be read, especially by those inmates financially unable to make a purchase from the publisher, by those not able to communicate with the publisher, and by those desiring books no longer in print or otherwise available from a publisher.[65]

[65]For the inmate who had the desired material at home or otherwise had access to it, such a denial is qualitatively more than a mere loss of a "cost advantage" such as existed in regard to bulk mailings in *Jones v. North Carolina Prisoners' Labor Union, Inc., supra,* 433 U.S. at 130-131.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed in all respects.

Respectfully submitted,

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